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JULY 8, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2021 ND 126

Yonis Daud Hussiene, Petitioner and Appellee

v.

Director, North Dakota
Department of Transportation, Respondent and Appellant

No. 20210045

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Steven L. Marquart, Judge.

REVERSED AND REINSTATED.

Opinion of the Court by VandeWalle, Justice.

Jesse N. Lange, Fargo, ND, for petitioner and appellee.

Michael T. Pitcher, Assistant Attorney General, Bismarck, ND, for respondent and appellant.

Hussiene v. NDDOT
No. 20210045

VandeWalle, Justice.

[¶1] The Department of Transportation appealed from a district court order and a judgment reversing a Department hearing officer's decision to suspend Yonis Hussiene's driving privileges for a period of 180 days. We reverse the order and the judgment and reinstate the hearing officer's decision.

I

[¶2] On September 5, 2020, North Dakota Highway Patrol Trooper Ryan Hoffner stopped a vehicle driven by Hussiene in Fargo for driving through a red light. Hoffner testified that he was sitting at a red light on an off ramp from I-29, waiting to go north, and he observed Hussiene's vehicle heading westbound through a red light on 13th Avenue. Hoffner also testified that although his own light was red, the turn signal for the cars turning left immediately next to Hoffner was green while Hussiene was still in the intersection. Hoffner said he believes "it's about a three second delay" from when one light turns red until the light for the traffic on the perpendicular side turns green.

[¶3] Dash camera footage from Hoffner's patrol vehicle does not show the traffic light for Hussiene. Rather, it shows only the traffic light across the intersection from Hoffner. The footage shows the left turn signal lights for the traffic immediately next to Hoffner turning green just as Hussiene is leaving the intersection.

[¶4] Hoffner yielded to the left-turning vehicles, and then he turned left following Hussiene and initiated a traffic stop. Hoffner detected an odor of alcohol, and Hussiene acknowledged drinking that night. Hoffner administered field sobriety tests and a preliminary breath test, and then he arrested Hussiene for driving under the influence. Hoffner read Hussiene the implied consent advisory for the chemical breath test, and they engaged in a conversation to determine if Hussiene would consent to the test. Ultimately, Hussiene said, "I do not want to take a breath test." After Hussiene refused the chemical breath test, Hoffner issued a promise to appear citation for the

refusal, a report and notice, and a warning for going through the red light. Hoffner then dropped Hussiene off at a gas station.

[¶5] Hussiene requested an administrative hearing. After finding Hoffner had sufficient grounds to stop the vehicle and Hussiene refused the chemical breath test, the hearing officer revoked Hussiene's license for 180 days. Hussiene appealed the hearing officer's decision to district court, and the court reversed the hearing officer's decision, concluding, "[T]hat a reasoning mind could not have reasonably determined that Hussiene ran a red light." The court held, "Hoffner failed to have a reasonable and articulable suspicion that Hussiene had violated or was about to violate the law."

II

[¶6] On appeal, the Department argues the district court erred when it determined Hoffner lacked a reasonable and articulable suspicion to stop Hussiene for entering an intersection on a red light. We have previously said:

> The Administrative Agencies Practice Act, N.D.C.C. ch. 28–32, governs the review of a decision to revoke driving privileges. *See Ike v. Director, N.D. Dep't of Transp.*, 2008 ND 85, ¶ 6, 748 N.W.2d 692. In an appeal from a district court's review of an administrative agency's decision, we review the agency's decision. *Wampler v. N.D. Dep't of Transp.*, 2014 ND 24, ¶ 6, 842 N.W.2d 877. Our review is limited and we give great deference to the agency's findings. *Id.* We do not make independent findings of fact or substitute our judgment for that of the agency; instead, we determine whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record. *Id.*

Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. "This Court reviews the Department's original decision, giving great deference to its findings of fact and reviewing its legal conclusions de novo." *McClintock v. Dep't of Transp.*, 2021 ND 26, ¶ 6, 955 N.W.2d 62.

[¶7] Under the Administrative Agencies Practice Act, this Court must affirm the agency's decision unless:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

III

[¶8] The Department argues Hoffner had sufficient grounds to stop Hussiene. In *Ell v. Director, Department of Transportation*, this Court said:

> To make a legal investigative stop of a vehicle, an officer must have a reasonable and articulable suspicion the motorist has violated or is violating the law. Whether reasonable suspicion exists is based on the totality of the circumstances and does not require an officer to see a motorist violating a traffic law or rule. The reasonable suspicion standard is an objective standard, which requires the court to determine whether a reasonable person in the officer's position would have been justified by some objective manifestation to suspect that the law was or was about to be violated. Observed traffic violations provide officers with the requisite suspicion for conducting investigatory stops.

2016 ND 164, ¶ 8, 883 N.W.2d 464 (internal citations and quotations omitted). The actual commission of a crime is not required to support a finding of reasonable suspicion. *State v. Bolme*, 2020 ND 255, ¶ 8, 952 N.W.2d 75. A driver must stop at a red light. N.D.C.C. § 39-10-05(3)(a).

[¶9] In this case, Hoffner testified that he observed the traffic light turning red before Hussiene entered the intersection. The hearing officer treated Hoffner as a credible witness, and Hoffner's testimony alone is enough to support the required reasonable and articulable suspicion for the stop. *See Ell*, 2016 ND 164, ¶ 8. Additionally, Hoffner testified he believes there is a three-second delay between when one light turns red and the other turns green for waiting traffic. If correct, this delay would create three seconds when all the traffic lights were red. Hoffner testified that he saw Hussiene's vehicle still in the intersection heading west when the left turn signal for the waiting northbound traffic turned green. The dash camera footage does not contradict this testimony.

[¶10] The State did not need to prove whether Hussiene actually ran a red light. Rather, the State merely needed to establish Hoffner had a reasonable and articulable suspicion to stop Hussiene. Nonetheless, the district court held Hoffner did not have a reasonable and articulable suspicion that Hussiene ran a red light because the dash camera footage shows "Hussiene's car entered the intersection when the light to oncoming traffic was red" and "Hussiene's car clears the intersection before the light to oncoming traffic turns green." However, based on the weight of the evidence from the entire record, a reasoning mind reasonably could have concluded Hoffner had the required reasonable and articulable suspicion to initiate the traffic stop. The evidence supports the hearing officer's finding that Hoffner had sufficient grounds to stop Hussiene. Therefore, the district court erred when it determined Hoffner did not have the required reasonable and articulable suspicion.

IV

[¶11] Hussiene argues the evidence did not show that he refused the chemical breath test. Although Hussiene did not file a cross-appeal, "an appellee is entitled on appeal to attempt to save a judgment by urging any ground asserted in the district court." *Estate of Clemetson*, 2012 ND 28, ¶ 13, 812 N.W.2d 388. In his brief to the district court, Hussiene argued that he did not refuse the chemical breath test. Therefore, we will address the issue.

[¶12] Section 39-20-14, N.D.C.C., requires a law enforcement officer to give an individual a preliminary breath test before administering a chemical test

under N.D.C.C. § 39-20-01. Refusal to submit to either test is admissible as evidence for driving under the influence and revoking an individual's driving privileges. N.D.C.C. §§ 39-20-01 and 39-20-14. "An affirmative refusal to submit to a chemical test must be clear and unequivocal." *State v. Johnson*, 2009 ND 167, ¶ 10, 772 N.W.2d 591. "Failure to submit to a test, whether by stubborn silence or by a negative answer, can be a refusal. A physical failure to cooperate may also amount to a refusal." *Sutton v. N.D. Dep't of Transp.*, 2019 ND 132, ¶ 9, 927 N.W.2d 93 (quoting *Gardner v. N.D. Dep't of Transp.*, 2012 ND 223, ¶ 15, 822 N.W.2d 55).

[¶13] Here, we look to the original decision made by the hearing officer to conduct our review. Hoffner testified that Hussiene refused the chemical breath test after he read Hussiene the implied consent advisory. A review of the dash camera footage shows at one point, after Hoffner read the implied consent advisory and told Hussiene he needed a yes or no answer, Hussiene said, "I do not want to take a breath test." The hearing officer found Hoffner "again requested a chemical breath test explaining the criminal consequences of refusing and Hussiene refused." On the weight of the evidence from the entire record, a reasoning mind reasonably could have concluded that Hussiene clearly and unequivocally refused to consent to the chemical breath test, as the hearing officer did here.

V

[¶14] Hoffner had a reasonable and articulable suspicion to stop Hussiene for failing to stop at a red light, and the weight of the evidence shows Hussiene refused the chemical breath test. We reverse the order and the judgment of the district court and reinstate the hearing officer's decision.

[¶15] Jon J. Jensen, C.J.
Gerald W. VandeWalle
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte